APPENDIX A

Supreme Court of New Jersey.

SPAULDING COMPOSITES COMPANY, INC., Plaintiff,
and
Caldwell Trucking PRP Group, Interested Party-Appellant,
v.
AETNA CASUALTY AND SURETY COMPANY, Allstate Insurance Company, as successor to Northbrook Insurance Company, American Centennial Insurance Company, American Home Insurance Company, Employers Insurance of Wausau, Greenwich Insurance Company, as successor to Harbor Insurance Company, Certain Underwriters at Lloyd's of London, Certain London Market Companies, New England Reinsurance Corporation, New Jersey Property-Liability Insurance Guaranty Association and John Doe Insurance Companies 1 Through 50, Defendants,
and
Industrial Underwriters Insurance Company, Liberty Mutual Insurance Company, Lexington Insurance Company, and National Union Fire Insurance Company of Pittsburgh, PA, Defendants-Respondents.

Argued Sept. 24, 2002.
Decided April 10, 2003.

Judgement of the Appellate Division reversed; grant of summary judgment reinstated.

Peter J. Herzberg, Morristown, argued the cause for appellant (Pitney, Hardin, Kipp & Szuch, attorneys; Mr. Herzberg and Kathy Dutton Helmer, on the brief).

John C. Sullivan, argued the cause for respondent Liberty Mutual Insurance Company (Klett Rooney Lieber &

Schorling and Post & Schell, attorneys; Thomas B. O'Brien, Jr. and Joseph B. Silverstein, Philadelphia, PA, on the briefs).

Martin P. Lavelle, New York City, argued the cause for respondents National Union Fire Insurance Company of Pittsburgh, PA, and Lexington Insurance Company.

Jerrald J. Hochman, Cherry Hill, argued the cause for respondent Industrial Underwriters Insurance Company (Siegal & Napierkowski, attorneys).

Gita F. Rothschild, Newark, submitted a brief on behalf of amici curiae G.A.F. Materials Corporation, R & F Alloy Wire and N.J.C. Holdings, Inc. (McCarter & English, attorneys; Alissa Pyrich and Gregory H. Horowitz, on the brief).

Wendy L. Mager, Princeton, submitted a brief on behalf of amicus curiae Complex Insurance Claims Litigation Association (Smith, Stratton, Wise, Heher & Brennan, attorneys).

The opinion of the Court was delivered by

LONG, J.

In this appeal, we revisit the "continuous trigger" and "pro rata allocation" doctrines we adopted to address complex environmental insurance coverage issues in *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 650 A.2d 974 (1994). More particularly, we have been asked how those principles affect the validity of a "non-cumulation" clause in a comprehensive general liability policy that is invoked by an insurer to restrict its exposure on nine years of coverage to a single policy limit. We hold that the rules enunciated in *Owens-Illinois* and reaffirmed in *Carter-Wallace, Inc. v. Admiral Ins. Co.*, 154 N.J. 312, 712 A.2d 1116 (1998) preclude enforcing such a limitation.

I

The facts of the case are detailed in the decision of the Appellate Division and are incorporated herein as if more fully set forth. 346 N.J. Super. 167, 787 A.2d 238 (2001). We recite only those necessary to our disposition.

Spaulding Composites Company, Inc. (Spaulding) purchased $678 million in comprehensive general liability (CGL) insurance between 1967 and 1984. Nine of those policies were issued by Liberty Mutual Insurance Company (Liberty) during the period from 1976 to 1984. The 1976 policy had a $500,000 limit and the other eight each had a $1 million limit. During those nine years in which Liberty was Spaulding's primary insurer, Spaulding also purchased excess liability in amounts varying from $23 million to $100 million.

Each of Liberty's nine CGL policies contained the identical non-cumulation clause that provided:

> PERSONAL INJURY LIABILITY AND PROPERTY DAMAGE LIABILITY
>
> (A) The limit of liability stated in the schedule as applicable to 'each *occurrence*' is the total limit of the company's liability for all damages because of *personal injury* or *property damage* as a result of any one occurrence.
>
> . . . .
>
> (C) For the purpose of determining the limit of the company's liability, all *personal injury* and *property damage* arising out of continuous or repeated exposure to substantially the same general conditions shall be construed as arising out of one occurrence.
>
> (D) If the same occurrence gives rise to *personal injury* or *property damage* which occurs partly before and partly within the policy period, the '*each occurrence*'

limit and the applicable aggregate limit of this policy shall be reduced by the amount of each payment made by the company with respect to such *occurrence* under a previous policy of which this policy is a replacement.

[(Emphasis added).]

In 1990, the United States Environmental Protection Agency (EPA) identified Spaulding as a potentially responsible party for disposing of hazardous lead- containing wastes at the Caldwell Trucking Company Superfund Site in Fairfield Township, New Jersey. In 1993, Spaulding declared bankruptcy. In 1994, Caldwell Trucking PRP Group (PRP) and the EPA each filed suit against Spaulding in the United States District Court alleging that Spaulding was responsible for cleanup costs at the Caldwell Trucking Superfund site. PRP initially joined Spaulding and its insurers, including Liberty, as direct defendants in the federal court suit seeking contribution to cover past and future costs of cleaning up the site. The district court dismissed PRP's claims against Liberty and the excess insurers on the ground that PRP did not have a right to bring a direct cause of action against the insurers. *Caldwell Trucking PRP Group v. Spaulding Composites Co.,* 890 F. Supp. 1247, 1256 (D.N.J.1995).

PRP's federal action against Spaulding continued, and in 1996 the district court granted PRP partial summary judgment on the issue of Spaulding's liability for an undetermined amount of the costs incurred by PRP to clean up the Caldwell Trucking Superfund site. *Caldwell Trucking PRP Group v. Spaulding Composites Co.,* Civ. No. 94-3531, 1996 WL 608490, at *14 (D.N.J. Apr.22, 1996). The lone issue that remained in the federal litigation was the amount of damages owed by Spaulding to PRP and the EPA for the site cleanup. In 1999, the district court ordered Spaulding, Liberty, the EPA, and PRP into mediation to decide the amount of coverage Liberty would provide under the CGL

policies. That effort proved unsuccessful and was abandoned in late 1999. We were informed at oral argument that judgments of liability have been entered against Spaulding in favor of PRP and the EPA totaling over $13 million, and the matter is now before the Third Circuit Court of Appeals.

In the interim, in 1995, Spaulding began this state court action seeking a declaratory judgment regarding insurance coverage in respect of its share of the defense and remediation costs at the Caldwell Trucking Superfund site. Spaulding moved for summary judgment against its insurers, including Liberty. PRP joined in the motion, which the trial court granted. In ruling, the trial court recognized that *Owens-Illinois* had adopted the continuous trigger theory warranting the treatment of sequential environmental damage as a separate occurrence "within each of the years of a CGL policy." (quoting *Owens-Illinois, supra,* 138 N.J. at 478, 650 A.2d 974). Because the non- cumulation clause is intended to govern cases involving a single occurrence causing damage over multiple years, the trial court held it to be "inapplicable as a matter of law."

The Appellate Division granted Liberty's motion for leave to appeal and reversed the summary judgment in favor of Spaulding and PRP, declaring the non- cumulation clause both clear and effective. *Spaulding Composites Co. v. Liberty Mut. Ins. Co.,* 346 N.J. Super. 167, 171, 787 A.2d 238 (2001). In so doing, the panel distinguished *Owens-Illinois* and *Carter-Wallace* on the basis that the CGL policies at issue in those cases were ambiguous. In effect, the panel held that *Owens-Illinois* and *Carter-Wallace* merely provided an interpretative rationale in cases involving unclear insurance contract language. *Spaulding Composites, supra,* 346 N.J. Super. at 178, 787 A.2d 238. The court also rejected Spaulding's argument that the non- cumulation clause is an invalid "other-insurance" or "escape" clause and

remanded the matter for the entry of partial summary judgment in favor of Liberty. *Id.* at 179-80, 787 A.2d 238.

Spaulding and PRP moved for leave to appeal. Several industrial insureds including GAF, R & F Alloy Wire, and NJC Holdings (collectively, the GAF *Amici*) were granted leave to appear as *amicus curiae,* as was the Complex Insurance Claims Litigation Association. The excess carriers filed protective answers to the motion for leave to appeal, taking no position concerning the enforceability and applicability of the non-cumulation clauses but seeking to preserve their rights to challenge PRP's characterization of their liability in this action if the court, *sua sponte,* considered the issue of allocation, which had not been raised below and was not determined by the trial court. In 2002, Spaulding assigned all of its rights to coverage from Liberty and its excess insurers to PRP. We granted PRP's motion for leave to appeal on March 19, 2002, *Spaulding Composites Co. v. Liberty Mut. Ins. Co.,* 171 N.J. 439, 794 A.2d 178 (2002), and now reverse.

II

To understand the issue in this case, *Owens-Illinois* and *Carter- Wallace* require explication.

A.

From 1948 to 1958, Owens-Illinois was the manufacturer of asbestos products including "Kaylo." *Owens-Illinois, supra,* 138 N.J. at 442-43, 650 A.2d 974. Many plaintiffs filed lawsuits against the company alleging personal injury and property damage arising out of the use of Kaylo. *Id.* at 444, 650 A.2d 974.

Over the years, the company maintained substantial CGL coverage in primary and excess layers. *Id.* at 443-44, 650 A.2d 974. CGL policies provide coverage to third persons who suffer bodily injury or property damage. Unlike claims or suits that are presented on a date certain and unlike most

corporate conduct that generally also may be confined to a single policy period, the bodily injury or property damage against which the CGL policy protects may be sustained by the claimant over an extended period of time. Donald C. Erickson, *Emerging Primary and Excess Coverage Issues in Continuous Trigger Regimes,* 28 Brief 18, 18 (Summer 1999). A coverage dispute arose between the company and its insurers. *Owens-Illinois, supra,* 138 N.J. at 444-45, 650 A.2d 974. More particularly, the issue was which of the insurance policies in effect from 1977 to 1985 provided indemnity to Owens- Illinois and in what amount. *Id.* at 446, 650 A.2d 974. Two aspects of the dispute required resolution: the first was the trigger for coverage; the second, allocation among triggered policies. *Id.* at 441, 650 A.2d 974.

The CGL policies at issue in *Owens-Illinois* provided coverage for property damage or bodily injury that "occurs" during the policy period. *Id.* at 447, 650 A.2d 974. We found no ambiguity in the language of the occurrence clause. "The words are all familiar and easily understandable." *Id.* at 457, 650 A.2d 974. Nevertheless, we recognized that resort to policy language and traditional rules of insurance contract interpretation would be inadequate to the task of answering when an occurrence takes place in an environmental exposure case.

> Our concepts of legal causation were developed in an age of Newtonian physics, not of molecular biology. Were it possible to know when a toxic substance clicks on a switch that alters irrevocably the composition of the body and before which no change has occurred, we might be more confident that occurrence-causing damages had taken place during a particular policy period. The limitations of science in that respect only compound the limitations of law.

Mass-exposure toxic-tort cases have simply exceeded the

> capacity of conventional models of judicial response.
>
> The overwhelming conclusion of the commentators who have evaluated the result is that ... common-law tort doctrines are ill-suited to the resolution of such injury claims, and that some form of statutorily-authorized compensation procedure is required if the injuries sustained by victims of chemical contamination are to be fairly redressed.
>
> No such procedure has been forthcoming. Hence, courts must adapt common-law doctrines to the peculiar characteristics of toxic-tort litigation.
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> [*Id.* at 458-59, 650 A.2d 974 (internal citations and quotation marks omitted).]

We went on to evaluate various theories potentially applicable to an environmental claim including the exposure theory[1], the manifestation theory[2] and the continuous trigger theory, among others. *Id.* at 449-51, 650 A.2d 974.

Ultimately, we abandoned as "hopeless" the task of attempting to define the particular point that is the occurrence in the long-tail injury process. Rebecca M. Bratspies, *Splitting the Baby: Apportioning Environmental Liability Among Triggered Insurance Policies,* 1999 BYU L. Rev. 1215, 1230 (1999). Taking our cue from the seminal decision of *Keene Corp. v. Insurance Co. of N. Am.,* 667

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[1] The exposure theory holds that the date of occurrence is that on which the injury-producing agent first contacts the body. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.,* 633 F.2d 1212, 1217 (6th Cir.1980), *clarified on reh'g,* 657 F.2d 814 (6th Cir.), *cert. denied,* 454 U.S. 1109, 102 S. Ct. 686, 70 L.Ed.2d 650 (1981).

[2] The manifestation theory provides that injury resulting from environmental exposure does not occur until the disease manifests itself. *Eagle-Picher Indus. v. Liberty Mut. Ins. Co.,* 682 F.2d 12, 16 (1st Cir.1982), *cert. denied,* 460 U.S. 1028, 103 S. Ct. 1279, 75 L.Ed.2d 500 (1983).

F.2d 1034 (D.C. Cir.1981) (holding that because asbestos-related disease develops slowly, date of occurrence should be continuous period from exposure to manifestation), *cert. denied,* 455 U.S. 1007, 102 S. Ct. 1644, 71 L.Ed.2d 875 (1982), we adopted the continuous trigger theory that states:

> [W]hen progressive indivisible injury or damage results from exposure to injurious conditions for which civil liability may be imposed, courts may reasonably treat the progressive injury or damage as an occurrence within each of the years of a CGL policy. That is the continuous-trigger theory for activating the insurers' obligation to respond under the policies.
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> [*Owens-Illinois, supra,* 138 N.J. at 478-79, 650 A.2d 974.]

In so doing, we joined a growing number of states that have adopted the continuous trigger theory.[3]

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[3] *See Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.,* 210 F.3d 672, 689-90 (6th Cir.2000) (predicting that Ohio Supreme Court would adopt flexible "continuing injury" trigger, which creates rebuttable presumption that all policies in effect from exposure to manifestation triggered); *Arrow Exterminators, Inc. v. Zurich Am. Ins. Co.,* 136 F. Supp. 2d 1340, 1349 (N.D. Ga. 2001) (concluding that where contract defines "occurrence" as including "continuous or repeated exposure" appropriate trigger is continuous); *GenCorp, Inc. v. AIU Ins. Co.,* 104 F. Supp. 2d 740, 749 (N.D. Ohio 2000) (holding continuous trigger applicable when environmental contamination claimant is able to show damage, like asbestosis, occurred on continuing basis); *Harleysville Mut. Ins. Co. v. Sussex County, Del.,* 831 F. Supp. 1111, 1124 (D. Del.1993) (applying Delaware law finding "slow leaching of pollutants from a landfill to adjacent property" constitutes progressive injury requiring use of continuous trigger theory), *aff'd,* 46 F.3d 1116 (3d Cir. 1994); *Broderick Inv. Co. v. Hartford Accident & Indem. Co.,* 742 F. Supp. 571, 573 (D. Colo.1989) (adopting continuous trigger method and finding each policy issued during period that damage occurred was triggered), *rev'd on o.g.,* 954 F.2d 601 (10th Cir.), *cert. denied,* 506 U.S. 865, 113 S. Ct. 189, 121 L.Ed.2d 133 (1992); *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.,* 662 F. Supp. 71, 76 (E.D. Mich.1987) (recognizing similarity

Concerning the methodology for dividing responsibility among multiple triggered policies, we unequivocally recognized the conjunction between the continuous trigger and how allocation ultimately would take place:

> [W]e believe that common-law resolution of the trigger-of-coverage issue requires that we consider, at the same time, the issue of scope of coverage if a policy is triggered. "[T]he choice of trigger theory is related to the method a court will choose to allocate damages between insurers."

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between asbestos claims and hazardous waste claims and holding that continuous trigger theory implicates "each exposure of the environment to a pollutant"); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir.1981) (holding that because asbestos-related disease develops slowly, date of occurrence should be continuous period from exposure to manifestation), *cert. denied,* 455 U.S. 1007, 102 S. Ct. 1644, 71 L.Ed.2d 875 (1982); *Montrose Chem. Corp. v. Admiral Ins. Co.,* 10 Cal. 4th 645, 42 Cal. Rptr. 2d 324, 913 P.2d 878, 880 (1995) (concluding "continuous injury" trigger should be adopted for third party liability insurance cases involving continuous or progressively deteriorating losses); *American Employer's Ins. Co. v. Pinkard Constr. Co.,* 806 P.2d 954, 956 (Colo. Ct. App.) (holding that because corrosion was progressive and continuous condition, each policy issued during period that damage occurred was triggered), *cert. dismissed,* 831 P.2d 887 (Colo.1991); *Sentinel Ins. Co. v. First Ins. Co.,* 76 Hawaii 277, 875 P.2d 894, 917 (1994) (remarking that continuous injury trigger may be employed to apportion equitably liability among insurers); *United States Gypsum Co. v. Admiral Ins. Co.,* 268 Ill. App. 3d 598, 205 Ill. Dec. 619, 643 N.E.2d 1226, 1257 (1994) (applying continuous trigger theory to asbestos-related property damage claims), *appeal denied,* 161 Ill. 2d 542, 208 Ill. Dec. 370, 649 N.E.2d 426 (1995); *J.H. France Refractories Co. v. Allstate Ins. Co.,* 534 Pa. 29, 626 A.2d 502, 507 (1993) (holding all stages of asbestosis disease process, between initial exposure until recognizable incapacitation, as bodily injury sufficient to trigger insurers' obligation to indemnify); *Wisconsin Elec. Power Co. v. California Union Ins. Co.,* 142 Wis. 2d 673, 419 N.W.2d 255, 258 (Ct. App. 1987) (holding that event triggering insurance policies began with installation of faulty power supply system and continued until problem was resolved), *review denied,* 142 Wis.2d 954, 419 N.W.2d 563 (1988).

[*Id.* at 459, 650 *A.*2d 974 (citing *Northern States Power Co. v. Fidelity & Cas. Co. of N.Y.*, 523 N.W.2d 657, 662 (Minn. 1994)).]

We went on to explore various approaches including joint and several and pro rata allocation. Diverging from *Keene,*

> [w]e rejected joint-and-several allocation, [*Owens-Illinois, supra,*] 138 N.J. at 468, 650 A.2d 974, a theory under which the problem of indivisible injury is resolved simply by collapsing the continuous injury into one year. Joint-and-several allocation effectively allows a policyholder to simply select one triggered year and exhaust the coverage provided during that period in satisfaction of its claim, *id.* at 459-62, 650 A.2d 974, requiring the insurers to sue each other for contribution. We determined that such an approach rested on an assumption not in accordance with the development of the law: "that at every point in the progression the provable damages due to injury in any one of the years from exposure to manifestation will be substantially the same...." *Id.* at 468, 650 A.2d 974. We also considered the effect on the allocation issue of "other insurance" clauses, which are provisions typically designed to preclude a double recovery when multiple, concurrent policies provide coverage for a loss. We determined that such clauses were not generally applicable in the continuous-trigger context where successive rather than concurrent policies were at issue. *Id.* at 470, 650 A.2d 974. In sum, we found the contract language and the traditional rules of interpretation to be unhelpful in settling on the proper method of allocating responsibility. *Id.* at 468-71, 650 A.2d 974.

Rather, our resolution of the issue was guided by our concern for the efficient use of resources to address the problem of environmental disease and by the demands of

simple justice. *Id.* at 472-73, 650 A.2d 974.

[*Carter-Wallace, supra,* 154 N.J. at 321-22, 712 A.2d 1116.]

Instead, we adopted what is called a pro-ration by years and limits method of allocation. We stated that

"any allocation should be in proportion to the degree of the risks transferred or retained during the years of exposure," and concluded that the "better formula" was to "allocate[ ] the losses among the carriers on the basis of the extent of the risk assumed, *i.e.,* proration on the basis of policy limits, multiplied by years of coverage."

[*Carter-Wallace, supra,* 154 N.J. at 322, 712 A.2d 1116 (citing *Owens- Illinois, supra,* 138 N.J. at 475, 650 A.2d 974 (citing *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.,* 20 Cal. App. 4th 296, 26 Cal. Rptr. 2d 35, 57 (1993))).]

Put another way,

[t]he basis of an individual insurer's liability is the aggregate coverage it underwrote during the period in which the loss occurred. Basically, a given insurer's liability is determined by comparing its particular exposure to the total amount of exposure assumed by all carriers of the triggered policies. This comparison yields a percentage that is then applied to the amount of loss the policyholder sustained.

[Thomas M. Jones & Jon D. Hurwitz, *An Introduction to Insurance Allocation Issues in Multiple-Trigger Cases,* 10 Vill. Envtl. L.J. 25, 44-45 (1999).]

Under that scheme, the insured is required to pay its "aliquot" share of both defense and indemnification on account of years in which it was uninsured, self-insured, or its coverage was exhausted or bankrupt. Erickson, *supra,* 28 Brief at 20.

Ultimately, we declared that our choice of the pro-rata allocation method was rooted in the policy considerations that we identified: (1) maximizing resources to cope with environmental injury or damage; (2) giving the greatest incentive to insureds to acquire insurance; and (3) notions of simple justice. *Owens-Illinois, supra,* 138 N.J. at 472-73, 650 A.2d 974.

B.

Thereafter, in *Carter*-Wallace, in a case involving the results of pharmaceutical waste disposal, we were faced with the question of how the responsibility of primary and excess insurers[4] is measured in the context of environmental damage over many years with a continuous trigger of liability. 154 N.J. at 317, 712 A.2d 1116.

We reaffirmed the continuous trigger principle and held, as we had in *Owens-Illinois,* that the contract language in the CGL policy and traditional rules of insurance policy interpretation were inadequate to determine the proper method of allocation among primary, first and second level excess insurers. *Id.* at 325, 712 A.2d 1116. Again, our assessment was not based on ambiguity in the insurance policy, but on the inherent difficulty of attempting to fairly allocate liability coverage in a long-tail environmental exposure case. *Id.* at 322, 712 A.2d 1116.

The second level excess policy that was at issue in *Carter-Wallace* provided $1 million in coverage in excess of $5.1 million in underlying primary and first layer excess

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[4] Primary insurance provides first dollar liability coverage up to the limits of the insurance contract, usually subject to a deductible. It potentially attaches upon the happening of an insured liability. Scott M. Seaman & Charlene Kittredge, *Excess Liability Insurance: Law and Litigation,* 32 Tort & Ins. L.J. 653, 655 (1997). Excess insurance is secondary coverage that ordinarily attaches only after a predetermined amount of primary insurance or self-insured retention has been exhausted. *Id.* at 656.

coverage. *Id.* at 319, 712 A.2d 1116. In addition, condition J of the policy was an exhaustion clause that provided in pertinent part that "[l]iability under this policy with respect to any occurrence shall not attach unless and until the insured, or the insured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence." *Ibid.*

Although there was nothing unclear about that provision, we rejected the excess insurers' horizontal exhaustion theory that stated that all primary and first layer excess policies in effect throughout the seventeen-year trigger period had to be exhausted prior to any second layer excess liability attaching. *Id.* at 324, 712 A.2d 1116. We also rejected the insured's proposal that the entire loss should be collapsed into a single year so that the excess layer would be reached. *Id.* at 325, 712 A.2d 1116.

Instead, we opted for an allocation method we characterized as "more faithful" to the principles articulated in *Owens-Illinois. Ibid. Citing* Chemical Leaman Tank Lines v. Aetna Cas. & Sur. Co., 978 F. Supp. 589 (D.N.J. 1997), *rev'd on o.g.*, 177 F.3d 210 (3d Cir. 1999), we adopted a vertical loss allocation by year. Carter-Wallace, supra, 154 N.J. at 326- 27, 712 A.2d 1116. Thus, for example, if in a given year primary coverage was $100,000, first-level excess, $200,000 and second-level excess $450,000, and the pro-rata loss allocated to that year was $325,000, "the primary insurer would pay $100,000, the first-level excess policy would be responsible for $200,000, and the second-level excess policy would pay $25,000." Ibid. In other words, the model consists of a horizontal axis made up of the number of years during which damages occurred and a vertical axis containing the pro-rata damages assigned to a specific year. Under that scheme, after pro-ration of damages horizontally, the policies implicated in each particular year are exhausted vertically. Accordingly,

the primary policy in a particular year answers until its limits are exhausted, then the first-level excess policy answers until its limits are exhausted and the vertical exhaustion scheme continues until all of the damages assigned to the particular year are covered or all of the insurance policies' limits are exhausted, whichever occurs first.

Echoing the policy considerations relied on in *Owens-Illinois,* we stated:

> [T]his approach makes efficient use of available resources because it neither minimizes nor maximizes the liability of either primary or excess insurance, thereby promoting cost efficiency by spreading costs. That method also promotes simple justice, by respecting the distinction between primary and excess insurance while not permitting excess insurers unfairly to avoid coverage in long-term, continuous-trigger cases. Additionally, adoption of that allocation method will introduce a degree of certainty and predictability into the complex world of environmental insurance litigation in continuous- trigger cases.
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> ....
>
> [W]e anticipate that the principles of *Owens-Illinois,* as clarified by our decision today, represent the presumptive rule for resolving the allocation issue among primary and excess insurers in continuous trigger liability cases unless exceptional circumstances dictate application of a different standard.
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> [*Carter-Wallace, supra,* 154 N.J. at 327-28, 712 A.2d 1116 (internal citations and quotation marks omitted).]

See also Quincy Mut. *Fire Ins. Co. v. Borough of Bellmawr,* 172 N.J. 409, 419, 799 A.2d 499 (2002) (observing that "[o]ur decision in *Owens-Illinois* was compelled by important public policy considerations, including the need to adapt our tort law to the peculiarities of

mass-exposure tort cases").

III

PRP argues that the Appellate Division erred in enforcing the non-cumulation clause because it is inapplicable when a separate occurrence takes place in each year of successive CGL policies, because it is an invalid other-insurance or escape clause, and because it effectively circumvents the continuous trigger and allocation model adopted in *Owens-Illinois.*

The GAF *Amici* echo that argument, contending that the allocation methodology established in *Owens-Illinois* and *Carter-Wallace* is incompatible with Liberty's non-cumulation clause and that the policy interests underpinning those decisions would be undermined if insurers could contract away their risk through like clauses.

Liberty counters that the Appellate Division's decision does not disturb either *Owens-Illinois* or *Carter-Wallace,* that the claim against Spaulding derived from a single occurrence thus reducing Liberty's liability to a single year of coverage, and that other courts have found similarly worded non- cumulation clauses unambiguous and enforceable.

The Complex Claims Litigation Association *amicus* sides with Liberty and argues in favor of the Appellate Division decision. In essence, it urges enforcement of what it characterizes as an unambiguous non-cumulation clause in order to give the insurer and the policyholder "what they bargained for."

IV

As scholars and treatise writers, without exception, have concluded, *Owens- Illinois* was a "watershed" in the cripplingly complex area of long-tail environmental exposure insurance coverage. Erickson, *supra,* 28 Brief at 20; *see* Jones & Hurwitz, *supra,* 10 Vill. Envtl. L.J. at 45

(*Owens- Illinois* is "seminal" case adopting "pro-ration by years and limits"); Barbara Hopkinson Kelly & Colin P. Hackett, *Environmental Insurance Coverage Claims and Litigation: Trends and Emerging Coverage Issues,* 718 PLI/ Comm 99, 123 (PLI Comm. Law & Practice Course Handbook Series No. A4-4477, May-June 1995) (stating that *Owens-Illinois* decision is "significant" and should be persuasive authority in other jurisdictions addressing environmental contamination cases involving trigger and allocation issues); Michael A. Orlando *et al.,* Recent Developments in Insurance Coverage Litigation, 34 Tort & Ins. L.J., 481, 498 (1999) (*Owens-Illinois* regarded as "landmark" decision).

What made *Owens-Illinois* so important is that it looked beyond contract language and traditional rules of insurance policy interpretation to develop a fair and uniform methodology for addressing complex environmental insurance coverage issues. Bratspies, *supra,* 1999 BYU L. Rev. at 1236; Erickson, *supra,* 28 Brief at 21; Garrett G. Gillespie, Note, *The Allocation of Coverage Responsibility Among Multiple Triggered Commercial General Liability Policies in Environmental Cases: Life After Owens-Illinois,* 15 VA. Envtl. L.J. 525, 550-52 (1996). Specific policy goals are at the heart of that methodology, including maximization of resources available for environmental cleanup; creating incentives for the purchase of insurance; and notions of simple justice. Barry R. Ostrager & Thomas R. Newman, *Handbook on Ins. Coverage Disputes* § 9.04 (9th ed.1998); Erickson, *supra,* 28 Brief at 21; Jones & Hurwitz, *supra,* 10 Vill. Envtl. L.J. at 45-46; Joren S. Bass, Note, *The Montrose Decision and Long-Tail Environmental Liability: A New Approach to Allocating Risk Among Multiple Third-Party Insurers,* 5 Hastings W.- Nw. J. Envtl. L. & Pol'y 209, 220 (1999); Gillespie, *supra,* 15 VA. Envtl. L.J. at 573-77 (1996).

To achieve those goals, *Owens-Illinois* declared that long-tail environmental exposure injury and damage would no longer be treated as one continuous occurrence, giving rise to joint and several liability by each insurer up to the full limit of its policy (with the policyholder or injured party choosing which year's policy would pay all the damages), but would be treated as one occurrence per year triggering all applicable policies, allocated pro rata, based on the degree of risk assumed. *Owens- Illinois, supra,* 138 N.J. at 478-79, 650 A.2d 974. The intent of *Owens- Illinois* in changing the allocation method among insurers was to find a fairer way to divide the damages among all the insurers whose policies provide coverage. Kelly & Hackett, *supra,* 718 PLI/Comm at 124-26; Orlando *et al., supra,* 34 Tort & Ins. L.J. at 498; Seaman & Kittredge, *supra,* 32 *Tort & Ins. L.J.* at 680. Integral to the scheme was the devolution of a portion of liability upon insureds for time periods in which they chose to "go bare" or self-insure. Ostrager & Newman, *supra,* § 9.04; Bratspies, *supra,* 1999 BYU L. Rev. at 1236-37; Bass, *supra,* 5 Hastings W.-Nw. J. Envtl. L. & Pol'y at 220; Gillespie, *supra,* 15 VA. Envtl. L.J. at 549.

As legal writers have recognized, it is obvious that *Owens-Illinois* did not simply provide an interim measure calculated to fill in an ambiguous policy provision. Indeed, we noted that the policies were not ambiguous. *Owens-Illinois,* 138 N.J. at 457, 650 A.2d 974. What made their language "unhelpful" was the difficulty inherent in trying to allocate insurance coverage in long- tail environmental exposure cases. That, in turn, created the need for an entirely different approach to environmental exposure coverage issues because "traditional techniques of contract interpretation cannot produce a coherent result." *Id.* at 471, 650 A.2d 974 (citing Note, *Adjudicating Asbestos Insurance Liability: Alternatives to Contract Analysis,* 97 Harv. L. Rev. 739, 743 (1984)).

> [I]n *Owens-Illinois,* the New Jersey Supreme Court overturned well established New Jersey law.... [T]he court took an issue that had been addressed by many courts around the country and forged a wholly new answer.... [T]he court ignored traditional rules of insurance policy construction founded on contra [proferentum] and based its holding on considerations of public policy.
>
> [Gillespie, *supra,* 15 VA. Envtl. L.J. at 573 (quoting Robert B. Chesler & David A. Thomas, *New Jersey Insurance Law After Signo, Morton, Gilbert Spruance, and Owens-Illinois,* 9 Mealey's Litig. Rep. 18, 24 (Mealey ed.1995)).]

In a word, *Owens-Illinois* eliminated reliance on particular contract language (other than limits and exclusions) and on traditional rules of interpretation, and set forth a uniform standard for resolving allocation issues in long-tail environmental exposure cases. *See Carter-Wallace, supra,* 154 N.J. at 328, 712 A.2d 1116 (observing that principles of *Owens-Illinois,* as clarified by *Carter-Wallace,* represent "presumptive rule" for resolving allocation issue in continuous trigger liability cases unless "exceptional circumstances" dictate application of different standard). It did so because of "the need for courts to choose one method, and apply it consistently, when allocating liability for progressive injuries." *Ibid.* (quoting Comment, *Allocating Progressive Injury Liability Among Successive Insurance Policies,* 64 U. Chi. L. Rev. 257, 259 (1997)).

V

The question presented is whether the non-cumulation clause in Liberty's CGL policies can be enforced consonant with the rules we adopted in *Owens-Illinois* and affirmed in *Carter-Wallace.* The answer is that it cannot.

Importantly, that outcome is not dependent on technical

characterizations of the non-cumulation clause. To be sure, PRP's argument that the non-cumulation clause is an invalid other-insurance clause under *Owens-Illinois* overreads that case and was rejected properly by the Appellate Division. *Spaulding Composites, supra,* 346 N.J. Super. at 179-80, 787 A.2d 238. As that court noted, the two types of clauses are quite different. Other-insurance clauses typically preclude double recovery when multiple concurrent policies cover a loss. *Carter-Wallace, supra,* 154 N.J. at 322, 712 A.2d 1116. On the contrary, a non-cumulation clause governs successive policies and prevents the accretion of limits when the policies have been triggered by a single occurrence. *See* Barry R. Ostrager & Thomas R. Newman, *Handbook on Ins. Coverage Disputes* § 11.02 (9th ed.1998) (stating that "non-cumulation" clauses reduce limit of liability by any amounts paid by insurer under prior policies with respect to same occurrence). *Owens-Illinois* properly recognized that other-insurance clauses essentially are irrelevant in resolving coverage issues involving multiple successive policies. *Owens-Illinois,* 138 N.J. at 470, 650 A.2d 974 (observing that "[i]f the policies do not overlap, such clauses are not generally applicable"). Nothing in that conclusion disposes of the question of the validity of a non-cumulation clause. *Spaulding Composites, supra,* 346 N.J. Super. at 178-79, 787 A.2d 238.

The Appellate Division likewise rejected PRP's further argument that the non-cumulation clause is an invalid escape clause. *Id.* at 179-80, 787 A.2d 238. Because it is well settled that an escape clause is a sub-species of other insurance, *see* 15 *Couch on Ins.* § 219:5 at 219-12 (3d ed.1999) (observing that there are three basic types of other-insurance clauses including escape clause), and because a non-cumulation clause is not an other- insurance clause, it follows that a non-cumulation clause technically is not an escape clause. Whether it suffers from the same deficiencies has been the subject of several judicial opinions with

different results. *See Air Prods. & Chems. Inc. v. Hartford Accident & Indem. Co.,* Civ. A. No. 86-7501, 1989 WL 73656, at *2 (E.D. Pa. June 30, 1989) (holding that non-cumulation provision did not constitute escape clause, as it only sought to limit, rather than preclude, insurer's liability for claims pending against insured), *vacated in part on o.g.,* 25 F.3d 177 (3d Cir.1994). *But see UTI Corp. v. Fireman's Fund Ins. Co.,* 896 F. Supp. 362, 378 (D.N.J. 1995) (invalidating non- cumulation clause found in other insurance language of policy as unenforceable escape clause, remarking that it is "unacceptable for an insurance company to provide no coverage under a policy for which it received premiums"); *Consolidated Asbestos Coverage Cases, Decision Concerning Phase IV Issues,* No. 1072 (Cal. Jud. Coord. Panel Aug. 29, 1988) (refusing to enforce non-cumulation provision in asbestos context concluding that clause was analogous to "escape" other-insurance clauses that generally are disfavored under law). In any event, we need not resolve that issue here.

As we have indicated, the outcome of this case does not depend on a technical characterization of Liberty's non-cumulation clause, but on the nature of the clause itself. As all parties agree, a non-cumulation clause generally, and Liberty's in particular, operates to limit an insurer's liability under multiple sequential CGL policies where losses related to a "single occurrence" trigger the successive policies. At the heart of a non-cumulation clause is the notion of a "single occurrence" with multiple year effects. Underlying that notion is the "single occurrence" language of the clause that states that damage "arising out of continuous or repeated exposure to substantially the same general conditions shall be construed as arising out of one occurrence." What the non-cumulation clause seeks to avoid is the "cumulation" of insurance policy limits when only one insured act or "occurrence" is involved. *Owens- Illinois* clearly rejected the idea that in an environmental exposure case, successive

policies are triggered by a "single" occurrence. As Judge Brotman underscored in *Chemical Leaman, supra,*

> [t]he New Jersey Supreme Court in *Owens-Illinois* held that under the continuous trigger theory it was propounding, progressive indivisible property damage *should be* treated as an occurrence within each of the years of a CGL policy. *On its face,* this language appears to direct treatment of progressive property damage as distinct occurrences triggering per-occurrence limits in each year of a policy.
>
> [978 F. Supp. at 607 (internal citations and quotation marks omitted) (emphasis added).]

So viewed, the "single occurrence" language does not implicate "cumulation" of policy limits for damage arising out of a single occurrence and is therefore inapplicable by its own terms.

But even if the non-cumulation clause was not facially inapplicable, we would not enforce it because it would thwart the *Owens-Illinois* pro-rata allocation modality. Once the court turns to pro rata allocation, it makes sense that the non-cumulation clause, which would allow the insurer to avoid its fair share of responsibility, drops out of the policy. Indeed, that is the holding of *Outboard Marine Corp. v. Liberty Mut. Ins. Co.,* 283 Ill. App. 3d 630, 219 Ill. Dec. 62, 670 N.E.2d 740, *appeal denied,* 169 Ill. 2d 570, 221 Ill. Dec. 439, 675 N.E.2d 634 (1996), to which we subscribe.

There, the insured, Outboard Marine Corporation (OMC), sought a declaratory judgment that its CGL insurer was obligated to defend it against a suit by governmental agencies concerning water pollution over a period of years. *Id.* at 745. One of OMC's excess insurers, the Home Insurance Company (Home), claimed that its maximum liability to OMC was $2 million because of a non-cumulation clause in Home's policies that otherwise stated

that its maximum liability was $3 and $5 million respectively. *Id.* at 746. After applying the continuous trigger theory to the case and determining that each excess insurer would be liable to OMC based on a pro-rata-time-on-the-risk basis, *id.* at 749-50, the court held the non-cumulation clause unenforceable, stressing that its application would thwart the pro-rata methodology, "would give the insurers a double credit and would deprive the insured of the full value of its premium." *Id.* at 750.

That analysis is wholly congruent with our own. The pro-rata sharing methodology has, at its core, a public policy that favors maximizing, in a fair and just manner, insurance coverage for cleanup of environmental disasters. By applying the non-cumulation clause, insurers who were actually "on the risk" would be insulated from their fair share of liability in direct contravention of *Owens-Illinois*. *See* 15 *Couch on Ins.* § 220:30 (3d ed. 1999) ("Once a court has determined that a loss is to be shared among sequential insurers on a pro rata basis, 'prior insurance' and 'non-cumulation of liability' clauses in the policies become unenforceable.").

We note that none of the cases cited as support for the enforceability of a non-cumulation clause by Liberty and its *amicus* involves application of the continuous trigger and pro-rata allocation methodology of *Owens-Illinois*. *See, e.g., Dickies Indus. Servs., Inc. v. Liberty Mut. Ins. Co.*, CA No. 1:97-CV-1391-WBH at *3 (N.D. Ga., Aug. 29, 2000) (deciding case prior to federal district court's "educated guess" that manifestation trigger would ultimately be rejected by Georgia courts in favor of continuous coverage trigger); *Endicott Johnson Corp. v. Liberty Mut. Ins. Co.*, 928 F. Supp. 176, 181 (N.D.N.Y. 1996) (applying injury-in-fact trigger--where coverage triggered if actual injury takes place during policy period), *appeal dismissed*, 116 F.3d 53 (2d Cir. 1997); *IO-I Brockway Glass Container, Inc. v.*

Liberty Mut. Ins. Co., Civ. No. 90-2797, 1994 WL 910935 (D.N.J. Feb.10, 1994) (deciding case prior to New Jersey's adoption of continuous trigger and pro-rate allocation doctrines); *Air Prods. & Chems. Co. v. Hartford Acc. & Indem. Co.*, 707 F. Supp. 762, 769 (E.D. Pa. 1989) (applying continuous trigger but apportioning liability among triggered policies "chronologically and seriatim"), *vacated in part on o.g.*, 25 F.3d 177 (1994). Because the conflict between *Owens-Illinois* and Liberty's non-cumulation clause is the basis for our holding, the cited decisions have no relevance here.

VI

Our sole determination in this case is that Liberty's non-cumulation clause is unenforceable under *Owens-Illinois*. We take no position on the number of occurrences, the actual allocation of responsibility as between carriers, or any other issue except to reaffirm the vitality of the *Owens- Illinois* approach and our commitment to its uniform application.

VII

The judgment of the Appellate Division is reversed. The trial court's grant of summary judgment on the non-cumulation clause in favor of PRP is reinstated.

For reversing--Chief Justice PORITZ and Justices COLEMAN, LONG, VERNIERO, LaVECCHIA, ZAZZALI and ALBIN--7.

Opposed--None.

APPENDIX B

Superior Court of New Jersey,
Appellate Division.

SPAULDING COMPOSITES COMPANY, INC., Plaintiff-Respondent/Cross-Appellant,
v.
LIBERTY MUTUAL INSURANCE COMPANY, Defendant-Appellant/Cross-Respondent,
and
Employers Insurance of Wausau, Allstate Insurance Company, Certain Underwriters at Lloyd's of London, London Market Company, Certain London Market Companies, American Home Insurance Company, Lexington Insurance Company, National Union Fire Continental Insurance Company, Industrial Underwriters Insurance,
Defendants-Appellants,
and
Aetna Casualty and Surety Company, (successor to Northbrook Insurance Company), American Centennial Insurance Company, Greenwich Insurance Company (successor to Harbor Insurance Company), New England Reinsurance Corporation, New Jersey Property-Liability Insurance Guaranty Association, Defendants.

Argued Oct. 10, 2001.
Decided Dec. 26, 2001.

Reversed and remanded.

Klett, Rooney, Lieber & Schorling, attorneys for appellant/cross-respondent Liberty Mutual Insurance Company (Thomas B. O'Brien, Jr. and Joseph B. Silverstein,

Philadelphia, Pa, on the brief).

Lowenstein Sandler, attorneys for respondent/cross-appellant Spaulding Composites Company, Inc. (Robert D. Chesler, of counsel and on the brief; Janet C. Castellano, on the brief).

Martin P. Lavelle, New York City, attorney for respondents National Union Fire Insurance Company of Pittsburgh, PA and Lexington Insurance Company (Mr. Lavelle, on the brief).

Siegal & Napierkowski, attorneys for defendant/respondent Industrial Underwriters Insurance Company (Jerrald J. Hochman, on the letter brief).

Pitney, Hardin, Kipp & Szuch, attorneys for" Interested Party" The Caldwell Trucking PRP Group (Peter J. Herzberg, Morristown, and Kathy Dutton Helmer, on the brief).

Smith, Stratton, Wise Heher & Brennan, Princeton, attorneys for Amicus Curiae Insurance Environmental Litigation Association (Laura A. Foggan, Daniel E. Troy, Meredith Fuchs and Kimberly M. Hrabosky of counsel; Wendy L. Mager on the brief).

Appellants Allstate Insurance Company, Continental Insurance Company, Employers Insurance of Wausau, and Certain Underwriters of Lloyd's, did not file a brief.

Before Judges SKILLMAN, WALLACE JR. and WELLS.

The opinion of the court was delivered by

WALLACE, JR., J.A.D.

Plaintiff Spaulding Composites Company sought a declaration that the non- cumulation clause in the insurance policies of Liberty Mutual and certain other defendants did not apply to its claims resulting from environmental property damage. The trial judge granted plaintiff's motion for partial summary judgment, and issued an order declaring that "the

non-cumulation" clause is inapplicable as a matter of law. We granted leave to appeal from this order. We conclude the contract language of the non-cumulation clause is clear and should be enforced.

We glean the following facts from the limited record on appeal. Spaulding allegedly sent lead-containing waste to a site in Fairfield Township from 1958 to 1973. Spaulding received notice of its potential liability in 1990, and filed bankruptcy in 1993. Subsequently, the bankruptcy court modified the automatic stay to permit the Caldwell Trucking PRP Group (Caldwell Group) and the United States Environmental Protection Agency (EPA) to maintain an action in the United States District Court of New Jersey for a declaratory judgment, and to recover insurance proceeds from Spaulding's insurers. The Caldwell Group filed such an action in July 1994. *See Caldwell Trucking PRP Group v. Spaulding Composites Co.*, 890 F. Supp. 1247, 1250 (D.N.J. 1995).

The insurers' moved to dismiss the Caldwell Group's direct action against them, and that motion was granted. *Ibid.* The district court found Spaulding could maintain its own action against its insurers. In July 1995, Spaulding filed a complaint in the Law Division against defendants who had issued primary or excess liability policies to Spaulding or its predecessors during the relevant period. Spaulding sought a judgment declaring that the insurers were obligated to undertake its defense in the Caldwell Group action, and to reimburse Spaulding for its costs in defending that action.

Spaulding eventually filed a motion for partial summary judgment against Liberty Mutual Insurance Company for a declaration that the non-cumulation clause in Liberty's insurance policies was inapplicable. One of Spaulding's attorneys, Robert Chesler, certified that Spaulding had purchased nine consecutive policies of primary insurance from Liberty covering the years 1975 to 1984. The first

policy had a limit of $500,000, and the other eight policies each had a limit of $1 million. Each of the policies had a version of the clause commonly known as a non-cumulation clause. Further, Chesler certified that during this same period, Spaulding purchased between $23 million and $100 million of excess coverage each year.

Liberty opposed Spaulding's motion and included copies of its insurance policies issued during the nine-year period. Each of the policies issued by Liberty contained a non-cumulation clause entitled "Limits of Liability." The pertinent portion of each policy provided:

LIMITS OF LIABILITY

It is agreed that Section IV of the policy jacket, LIMITS OF LIABILITY, is deleted and replaced by the following: LIMITS OF LIABILITY

Regardless of the number of (1) insureds under this policy, (2) persons or organizations who sustain personal injury or property damage, (3) claims made or suits brought on account of personal injury or property damage to which this policy applies, the Company's liability is limited as follows:

PERSONAL INJURY LIABILITY AND PROPERTY DAMAGE LIABILITY

(A) The limit of liability stated in the schedule as applicable to 'each *occurrence* is the total limit of the company's liability for all damages because of *personal injury* or *property damage* as a result of any one *occurrence.*

* * * *

(C) For the purpose of determining the limit of the company's liability, all *personal injury* and *property damage* arising out of continuous or repeated exposure to substantially the same general conditions shall be

considered as arising out of one *occurrence*.

(D) If the same *occurrence* gives rise to *personal injury* or *property damage* which occurs partly before and partly within the policy period, the 'each *occurrence* ' limit and the applicable aggregate limit of this policy shall be reduced by the amount of each payment made by the company with respect to such *occurrence* under a previous policy or policies of which this policy is a replacement.

Spaulding urged that the non-cumulation clause did not apply because such clauses are not enforceable as a matter of law in environmental property damage cases, and therefore it was entitled to liability coverage from Liberty in the amount of $8.5 million rather than $1 million. Liberty argued that the clear language of the policy limited coverage to $1 million. The motion judge interpreted *Owens-Illinois Inc. v. United Ins. Co.*, 138 N.J. 437, 478, 650 A.2d 974 (1994), to require nullification of the non-cumulation clause in an environmental property damage case. The judge applied the "continuous trigger rule" to treat the progressive damage as an occurrence within each year of the policy. The judge concluded the "non-cumulation clause" was inapplicable as a matter of law and granted partial summary judgment in favor of Spaulding. We granted Liberty's motion for leave to appeal.

Preliminarily, we are satisfied that the meaning and effectiveness of the non-cumulation clause presents a purely legal question that is suitable for decision on a motion for summary judgment. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540, 666 A.2d 146 (1995); *see also Blum v. Prudential Ins. Co. of Am.*, 125 N.J. Super. 195, 197-98, 309 A.2d 905 (Law Div. 1973), *aff'd*, 132 N.J. Super. 204, 333 A.2d 277 (App. Div. 1975). We limit our review to a determination of that issue, and do not address whether there was an "occurrence" during any of the years Liberty insured

Spaulding, or what effect the non-cumulation provisions of the Liberty policy may have upon the coverage provided under any of the various excess policies.

We turn to the essential issue in this appeal, which is whether the non- cumulation clause is unambiguous and enforceable.

"The source of any duty on the part of the Insurance Companies to defend actions or to pay any judgments is obviously in the contract of insurance." *Owens-Illinois, supra*, 138 N.J. at 446-47, 650 A.2d 974. Our Supreme Court has recognized that insurance policies are contracts of adhesion and are subject to special rules. *Longobardi v. Chubb Ins. Co. of N.J.*, 121 N.J. 530, 537, 582 A.2d 1257 (1990). Thus, in interpreting language in an insurance policy courts "assume a particularly vigilant role in ensuring their conformity to public policy and principles of fairness." *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 175, 607 A.2d 1255 (1992). Any ambiguity in an insurance policy should be resolved in favor of the insured. Ibid. "Nevertheless, only genuine interpretational difficulties will implicate the doctrine that requires ambiguities to be construed favorably to the insured." *Progressive Cas. Ins. Co. v. H*urley, 166 N.J. 260, 273-74, 765 A.2d 195 (2001).

In determining whether there is an ambiguity, words in an insurance policy should be interpreted according to their plain and ordinary meaning. *Voorhees, supra*, 128 N.J. at 175, 607 A.2d 1255; *Longobardi, supra*, 121 N.J. at 537, 582 A.2d 1257. Moreover, public policy concerns alone are not sufficient to permit a finding of coverage in an insurance contract where its plain language cannot be read to provide that coverage. *State v. Signo Trading Int'l, Inc.*, 130 N.J. 51, 66, 612 A.2d 932 (1992).

With these principles in mind, we turn to Liberty's contention that the non-cumulation of limits provision is clear and unambiguous. Liberty asserts that the purpose of

the non-cumulation provision is to prohibit stacking or cumulation of policy limits to consecutive Liberty policies that may apply to the same occurrence loss.

The non-cumulation provision clearly states that all damage arising out of "continuous or repeated exposure to substantially the same general conditions constitute a single occurrence." Further, this provision provides that when a single occurrence gives rise to damage "partly before and partly within the policy period," the limits of liability of the policy "shall be reduced by the amount of each payment made by the company with respect to such occurrence under a previous policy or policies of which this policy is a replacement." In our view, this policy language is clear and unambiguous.

Unless our Supreme Court's decisions in *Owens-Illinois, supra*, and *Carter-Wallace Inc. v. Admiral Ins. Co.*, 154 N.J. 312, 712 A.2d 1116 (1998), preclude us from giving effect to the clear policy language, the non-cumulation provisions should be enforced. In Owens-Illinois, the insured sought a declaration that its two lead insurance carriers must provide coverage for Owens Illinois' asbestos related personal injury and property damage claims. The Chancery judge held that all insurers whose policies were triggered under a continuous-trigger theory or injury in-fact theory were jointly and severally liable to the extent of the policy limits. We affirmed in part, reversed in part, and remanded in part. *Owens-Illinois, Inc. v. United Ins. Co.*, 264 N.J. Super. 460, 625 A.2d 1 (App. Div. 1993).

The Supreme Court granted certification to address whether a continuous trigger theory applied, and if so, what would be a fair method of allocation of coverage. The Court explained that the term trigger was merely a label for the event or events that "under the terms of the insurance policy determines whether a policy must respond to a claim in a given set of circumstances." *Owens-Illinois, supra*, 138 N.J.

at 447, 650 A.2d 974. Ultimately, the Court held that "when a progressive indivisible injury or damage results from exposure to injurious conditions for which civil liability may be imposed, courts may reasonably treat the progressive injury or damage as an occurrence within each of the years of a [covered] policy." *Id.* at 478, 650 A.2d 974. Thus, the continuous-trigger theory required each insurer providing coverage during the period to respond to the personal injury claims. *Id.* at 478-79, 650 A.2d 974. Similarly, the Court found that property damage attributable to long-term embedding of contaminates was sufficiently analogous to personal injury to warrant use of a continuous trigger approach. In addressing the method of allocation among multiple triggered policies, the Court held that a fair method of allocation is one that is related to both the time on the risk and the degree of the risk assumed. *Ibid.* Therefore, the Court allocated "the losses among the carriers on the basis of the extent of the risk assumed, i.e., proration on the basis of policy limits, multiplied by years of coverage." *Id.* at 475, 650 A.2d 974.

Further, the Court noted that "other insurance" clauses, which are provisions designed to preclude a double recovery when multiple concurrent policies provide coverage for a loss, were not generally applicable in a continuous triggered situation where successive, rather than concurrent, policies were at issue. *Id.* at 470-71, 650 A.2d 974. The Court stated:

> The other usual principles of interpretation of contracts of insurance do not provide much guidance. As the Appellate Division noted, "O-I was a sophisticated insured and cannot seek refuge in the doctrine of strict construction by pretending it is the corporate equivalent of the unschooled, average consumer." 264 N.J. Super. at 489, 625 A.2d 1. Assessing the objectively reasonable expectations of a policyholder in this context of long- tail

injuries is also very difficult. *Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 330, 495 A.2d 406 (1985). At least in the case of property damages due to environmental contamination, the retroactive imposition of absolute liability under laws like CERCLA, 42 U.S.C. § § 9601-9675, was surely unknown, if not unknowable.

And the doctrine of contra preferentem, construing any ambiguity against the insurer as drafter, *Uniroyal, supra*, 707 F. Supp. at 1376, can produce uneven results. For example, in *Eagle-Picher Industries v. Liberty Mutual Ins. Co.*, 523 F. Supp. 110 (D. Mass. 1981), aff'd, as modified, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028, 103 S. Ct. 1279, 75 L.Ed.2d 500 (1983), the insured preferred a manifestation theory. (On appeal, the insured in *Eagle-Picher* advocated the continuous-trigger theory. 682 F.2d at 16.) In *Forty-Eight Insulations, supra*, 633 F.2d 1212, the exposure theory afforded the insured the most coverage. To have shifting rules of interpretation that depend on the configuration of insurance coverage is unacceptable to us.

The language of the policies does not itself yield either result and the usual rules of interpretation are less helpful in this context.

[*Id.* at 471, 650 A.2d 974].

The Court also noted that the law of environmental liability insurance "will have to develop over time and trial courts must be flexible in responding to new fact situations." *Id.* at 478, 650 A.2d 974.

In *Carter-Wallace, supra*, the Court addressed how excess insurance should be considered when allocating responsibility under a continuous trigger of liability over many years. Initially, the Court rejected both the insured and the insurer's proposed allocation methods. The Court noted that the insurer's method of horizontal exhaustion

subordinated its coverage responsibility to all primary and first-level excess policies in effect during the entire trigger period, and was based on its policy language that required the exhaustion of underlying limits of coverage before its second-level excess policy attached. *Carter-Wallace, supra*, 154 N.J. at 323, 712 A.2d 1116. The Court noted the similarity between the insurer's exhaustion provision and the "other insurance" clauses that were found not to apply in a continuous trigger context. *Id.* at 324-25, 712 A.2d 1116. The Court expressly found that it was "unable to find the answer to the allocation language in the polic[y]." Ibid. Similarly, the Court rejected the insured's approach of treating the loss sustained during the entire period as if it occurred in only one year before looking to the excess coverage limits. Ibid.

Instead, in Carter-Wallace, the Court adopted the approach of Judge Brotman in *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 978 F. Supp. 589 (D.N.J. 1997), *rev'd on other grounds*, 177 F.3d 210 (3rd Cir. 1999). *Id.* at 325, 712 A.2d 1116. The Court noted that, under similar circumstances, Judge Brotman "adopted a method that vertically allocated each policy in effect for that year, beginning with the primary policy and proceeding upward through each succeeding excess layer." *Id.* at 326, 712 A.2d 1116. The Court gave the following example to demonstrate the fair allocation of losses among carriers to the extent of the risk assumed by each:

> Assume that primary coverage for one year was $100,000, first-level insurance totaled $200,000 and second-level excess coverage was $450,000. If the loss allocated to that specific year was $325,000, the primary insurer would pay $100,000, the first-level excess policy would be responsible for $200,000 and the second-level excess policy would pay $25,000.
>
> [*Id.* at 326-27, 712 A.2d 1116.]

The Court found this approach promoted efficiency by spreading the cost, was simple, respected the difference between primary and excess insurance while not permitting excess insurers to avoid coverage in long-term continuous-trigger cases, and would introduce "a degree of certainty and predictability" in a complex field. Ibid. In particular, the Court expressed "that that solution is consistent with the contract language," as the second-level excess policy "will not be pierced unless and until the primary and first-level excess policies in effect for a given year have been expended." *Id.* at 327, 712 A.2d 1116.

We perceive no inconsistency between the Court's approach in *Owens- Illinois* and *Carter-Wallace* and our approach of applying the clear language of Liberty's non-cumulation clause. In both Owens-Illinois and Carter-Wallace, the Court expressed that it was unable to find the answer to the allocation issue in the language of the policy and found "the traditional rules of interpretation to be unhelpful." *Owens-Illinois, supra*, 138 N.J. at 468- 471, 650 A.2d 974; *Carter-Wallace, supra*, 154 N.J. at 322, 712 A.2d 1116. Therefore, the Court adopted a method that was fair in light of the complexities of environmental litigation. Here, we find the answer in the clear language of the policy. We are compelled to apply the provisions of the policy that a "continuous" or "repeated" exposure shall be treated as "one occurrence" and that "the applicable aggregate limit of [the] policy shall be reduced by the amount of each payment made by the company with respect to such occurrence under a previous policy or policies of which this policy is a replacement." Consequently, Liberty's non-cumulative clause should be enforced to limit its aggregate liability for a continuous or repeated exposure to $1 million.

We are unpersuaded by Caldwell Group's contention that the non- cumulation clause is an "other insurance" clause. Caldwell Group notes that there are three types of "other

insurance" clauses: (1) excess clauses (i.e. the policy pays an excess coverage), (2) pro-rate clauses (i.e. the policy pays a pro-ratio share of the loss) and (3) escape clauses (i.e. the policy pays nothing). Caldwell Group contends that Liberty's non-cumulation clause is an escape clause which does not apply in a continuous trigger context. *See Carter-Wallace, supra*, 154 N.J. at 324-325, 712 A.2d 1116. Caldwell Group cites *UTI Corp. v. Fireman's Fund Ins. Co.*, 896 F. Supp. 362 (D.N.J. 1995), in support of its argument. In *UTI*, the "non-cumulation" clause was contained within the "other insurance" clause and provided that coverage of the policy shall apply as excess of any other applicable coverage and that:

> if the insured has "other insurance" with this Company covering a claim also covered by this policy, the insured must elect which policy shall apply and the Company shall be liable under the policy so elected and shall not be liable under any other provision.

The trial judge concluded the clause was an escape clause because, although the insurer collected premiums for several blanket excess policies, it limited coverage so that the insurer would only be liable under one such policy for any claim made by the insured. *Id.* at 378.

We disagree that the non-cumulation provision in Liberty's policy is an "other insurance" clause. As noted by the Court in *Carter-Wallace*, "other insurance" clauses are "designed to preclude double recovery when multiple *concurrent* policies provide coverage for a loss." *Carter-Wallace, supra*, 154 N.J. at 322, 712 A.2d 1116 (emphasis added). Liberty's non- cumulation clause does not involve concurrent policies. Rather it is addressed to an occurrence that may span successive policy periods. Further, the "other insurance" provisions of Liberty's policies were contained in separate endorsements from the non-cumulation clause. Simply put, Liberty's non-cumulation clause did not

represent an escape clause, or other insurance clause.

We conclude that Liberty's non-cumulation of limits provision is clear, unambiguous and enforceable. We reverse the judgment and remand to enter judgment in favor of Liberty.

APPENDIX C

[Court's File Stamp: Jan 11 2001]

LOWENSTEIN SANDLER, P.C.
Attorneys At Law
65 Livingston Avenue
Roseland, New Jersey 07068
973.597.2500
Attorneys for Plaintiff

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION: ESSEX COUNTY

DOCKET NO. ESX-L-8623-95

SPAULDING COMPOSITES COMPANY,	
PLAINTIFF,	**CIVIL ACTION**
-VS-	
AETNA CASUALTY & SURETY CO., ET AL.,	ORDER
DEFENDANTS.	

The above matter having been opened to the Court by Lowenstein, Sandler, PC, attorneys for Plaintiff, and the Court having considered all papers submitted in opposition thereto, and the Court having heard oral argument, and for good cause,

It is on this the 11th day of January, 2001,

ORDERED THAT the "non-cumulation" clause is inapplicable as a matter of law, and plaintiff's Motion for Partial Summary Judgment is hereby granted,

ORDERED that a copy of this Order be served on all counsel of record within 7 days hereof.

s/ Arthur Minuskin, J.S.C.
Hon. Arthur J. Minuskin, J.S.C.

PAPERS CONSIDERED

	YES	NO	DATE
NOTICE OF MOTION	_____	_____	_____
MOVANT'S AFFIDAVITS	_____	_____	_____
MOVANT'S BRIEF	_____	_____	_____
ANSWERING AFFIDAVITS	_____	_____	_____
ANSWERING BRIEF	_____	_____	_____
CROSS MOTION	_____	_____	_____
MOVANT'S REPLY	_____	_____	_____
OTHER _____	_____	_____	_____

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE

CHAMBERS OF

ARTHUR MINUSKIN

JUDGE T/A

ESSEX COUNTY COURTS BUILDING

NEWARK, NEW JERSEY 07102

December 21, 2000

To all counsel on attached list:

RE: SPAULDING COMPOSITES CO., INC. V. AETNA CASUALTY
DOCKET NO. ESX-L-008623-95

Dear Counsel:

The following is the court's opinion concerning Plaintiff's Motion for Partial Summary Judgment:

The dispute in this case arises from the denial of insurance coverage by the defendant insurers. Plaintiff Spaulding purchased insurance policies from Defendant Liberty Mutual Insurance Company (hereinafter "Liberty") and Plaintiff Spaulding purchased excess insurance coverage from over one dozen other defendant insurance carriers (hereinafter "Excess") over the course of a nine-year period. The policies issued by Defendant Liberty contain a "non-cumulation clause."

Plaintiff Spaulding purchased nine policies of primary insurance from Defendant Liberty. The first policy has a limit of $500,000 and the other eight policies each have limits of $1 million, for a total limit of $8.5 million. These policies provide for coverage for property damage that

occurs during the policy period and contain non-cumulation clauses that promise to provide coverage for property damage continuing beyond the end of a policy year in exchange for reducing the policy limits by the amounts paid for the same occurrence under prior insurance policies.

Defendants Liberty and Excess interpret the "non-cumulation clause" in a manner that denies coverage to Plaintiff Spaulding in excess of $1 million. However, Plaintiff Spaulding's interpretation is that it should receive $8.5 million from Defendant Liberty rather than just $1 million.

Plaintiff moves for Partial Summary Judgment on the basis that the "non-cumulation" clause is inapplicable because such clauses are unenforceable as a matter of law in environmental property damage cases like the matter at bar.

Under *Owens-Illinois*, "non-cumulation" clauses are inapplicable to and unenforceable with respect to environmental property damage claims. The nature of environmental property damage is that such damage occurs continuously and is not divisible into amounts of damage per year. For this reason, *Owens-Illinois* adopted the "continuous trigger rule," which states "when progressive indivisible injury or damage results from exposure to injurious conditions for which civil liability may be imposed, courts may reasonably treat the progressive injury or damage as an occurrence within each of the years of a CGL policy." That is the continuous trigger theory for activating the insurer's obligation to respond under the policies. *Owens-Illinois Inc. v. United Insurance Co.*, 138 *N.J.* 437, 478 (1994).

The injury in the present matter resulted from the transfer of waste by Plaintiff Spaulding to the Caldwell Superfund site in Fairfield, New Jersey and the environmental property damage that occurred as the result of the transfer. Therefore this matter is governed by *Owens-Illinois*, and the

"continuous trigger theory" should be utilized. Further, the situation in the matter at bar is analogous to *Owens-Illinois*. For this reason the "non-cumulation" clause is inapplicable as a matter of law. Plaintiff Spaulding's Motion for Partial Summary Judgment is hereby granted.

Very truly yours,

s/ Arthur Minuskin
ARTHUR MINUSKIN, JSC t/a
(Retired, on recall)

gph
Attachment

APPENDIX E

[Filed Stamp Jun 23 2003]
SUPREME COURT OF NEW JERSEY
M-1347/M-1348 September Term 2002
52,473

SPAULDING COMPOSITES COMPANY, INC.,
Plaintiff
and
CALDWELL TRUCKING PRP GROUP,
INTERESTED PARTY
Respondent,
v.
LIBERTY MUTUAL INSURANCE COMPANY, et al.,
Defendants-Movants.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for an extension of time to file a motion for reconsideration (M-1347) is granted, and it is further

ORDERED that the motion for reconsideration of the opinion (M-1348) is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 20th day of June, 2003.

The foregoing is a true copy
of the original on file in my office.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY

APPENDIX F

POST & SCHELL, P.C.
Overlook Center - 2nd Floor
100 Overlook Drive
Princeton, New Jersey 08540
(609) 924-3333
Attorneys for Defendant/Respondent,
Liberty Mutual Insurance Company

SPAULDING COMPOSITES COMPANY, INC., **PLAINTIFF-APPELLANT,** **AND** **CALDWELL TRUCKING PRP GROUP,** **INTERESTED PARTY-APPELLANT,** **V.** **AETNA CASUALTY AND SURETY COMPANY, ET AL.,** **DEFENDANTS-RESPONDENTS.**	**SUPREME COURT OF NEW JERSEY** **A-88, SEPTEMBER TERM 2001** **NO. 52,473** **CIVIL ACTION** **ON MOTION FOR RECONSIDERATION OF THE COURT'S DECISION OF APRIL 10, 2003** NOTICE OF MOTION FOR RECONSIDERATION OF THE COURT'S DECISION OF APRIL 10, 2003 PURSUANT TO R. 2:11-6

TO: STEPHEN W. TOWNSEND, CLERK
Supreme Court of New Jersey
Hughes Justice Complex
25 West Market Street

Trenton, New Jersey 08625

and

All Counsel of Record listed on the attached Certificate of Service

SIR:

PLEASE TAKE NOTICE that pursuant to Rule 2:11-6 of the Rules Governing the Courts of the State of New Jersey, the undersigned, counsel for defendant/respondent Liberty Mutual Insurance Company ("Liberty Mutual"), respectfully moves this Court for an Order granting Liberty Mutual's Motion for Reconsideration of the Court's Decision of April 10, 2003; and

PLEASE TAKE FURTHER NOTICE that Liberty Mutual will rely upon the enclosed Memorandum of Defendant/Respondent Liberty Mutual Insurance Company in Support of the Motion for Reconsideration being filed herewith.

Respectfully submitted,

POST & SCHELL, P.C.

Dated: 04/24/03

BY: s/John C. Sullivan
John C. Sullivan, Esquire
Overlook Center - 2nd Floor
100 Overlook Drive
Princeton, NJ 08540
(609) 924-3333

Attorneys for Defendant-Respondent, Liberty Mutual Insurance Company

APPENDIX G

SPAULDING COMPOSITES COMPANY, INC.,

PLAINTIFF-APPELLANT,

AND

CALDWELL TRUCKING PRP GROUP,

INTERESTED PARTY-APPELLANT,

V.

AETNA CASUALTY AND SURETY COMPANY, ET AL.,

DEFENDANTS-RESPONDENTS.

SUPREME COURT OF NEW JERSEY

A-88, SEPTEMBER TERM 2001
NO. 52,473

CIVIL ACTION

ON MOTION FOR RECONSIDERATION OF THE COURT'S DECISION OF APRIL 10, 2003

MEMORANDUM OF DEFENDANT/RESPONDENT LIBERTY MUTUAL INSURANCE COMPANY IN SUPPORT OF THE MOTION FOR RECONSIDERATION

John C. Sullivan, Escuire
POST & SCHELL, P.C.
Overlook Center - 2nd Floor
100 Overlook Drive
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(609) 924-3333
Attorneys for *Defendant/Respondent, Liberty Mutual Insurance Company*

[TABLES OMITTED]

I. BRIEF STATEMENT OF GROUNDS FOR RECONSIDERATION

This matter is before the Court on Liberty Mutual Insurance Company's motion, pursuant to R. 2:11-6, for reconsideration of the Court's decision of April 10, 2003. In its Opinion, this Court held that "Liberty's non-cumulation clause is unenforceable" under Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437 (1994). Op. at 30. This ruling was based on the Court's determination that Owens-Illinois required courts to "look[] beyond contract language and traditional rules of insurance policy interpretation" in addressing environmental insurance coverage issues. Op. at 21. It is respectfully submitted that Owens-Illinois did not require courts to ignore insurance contract language when, as here, those provisions directly address the handling of the claim at issue. The Court did not declare any policy language unenforceable in Owens-Illinois; it found only that the particular policy language under consideration in that case was inapplicable. While Liberty recognizes that there can be "difficulty inherent in trying to allocate insurance coverage in long-tail environmental exposure cases," Op. at 22-23, it is submitted that the solution to the problem is not to "eliminate[] reliance" on contract language, which has always been the cornerstone of policy interpretation under New Jersey law. Id. at 23.

An essential element of the risk transfer philosophy which Owens-Illinois attempts to promote is risk acceptance by insurers. Court decisions which do not give effect to policy language inhibit risk transfer because insurance companies will not write policies if they do not have confidence that their policy limitations will be honored. In Owens-Illinois, this Court stated that courts should consider the signals sent to the economic system by their decisions. 138 N.J. at 473. A decision that acts as a disincentive to

insurers who might otherwise issue policies will in the long run reduce the available assets to manage environmental risks. Id.

In addition, the Spaulding decision is inconsistent on an issue of critical importance. At one point in the decision, the Court states: "Owens-Illinois clearly rejected the idea that in an environmental exposure case, successive policies are triggered by a 'single' occurrence." Op. at 27. Three pages later, however, the Court stated that "[w]e take no position on the number of occurrences." Op. at 30. Under the Liberty contracts, the non-cumulation clause is not implicated unless there has been a determination that there is only one occurrence. Therefore, it is respectfully submitted that reconsideration is required to clarify this issue.

Finally, this Court's retroactive invalidation of the Limit of Liability provision in Liberty's contracts violates Liberty's due process rights. The Liberty contracts at issue in this case were made between 19 and 27 years ago and, as written, did not allow for the stacking of policy limits. The consequences for Liberty are devastating: Liberty has been left with contracts in which all of the contractual obligations remain intact while the provisions limiting those obligations have been crossed out. As a result, Liberty will be required to pay millions of dollars in this case and hundreds of millions of dollars in other New Jersey cases that it had no contractual obligation to pay. Spaulding constitutes a new rule of law. In the interest of fairness and justice, the Spaulding holding should be applied only prospectively to policies issued after the ruling.[1]

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[1] Liberty Mutual relies on the Statement of Facts set forth in the original briefs before the Court.

II. ARGUMENT

A. THE COURT'S NULLIFICATION OF LIBERTY'S NON-CUMULATION CLAUSE MARKS A SIGNIFICANT DEPARTURE FROM OWENS-ILLINOIS AND NEW JERSEY INSURANCE LAW WHICH HAS REPEATEDLY RECOGNIZED THAT WHEN THE TERMS OF A POLICY ARE CLEAR AND UNAMBIGUOUS THE COURT MUST ENFORCE THE CONTRACT AS WRITTEN.

Courts in New Jersey have long recognized that the most fundamental rule of construction in interpreting an insurance contract, like any other contract, is that the language of the contract controls. Indeed, this is the law in every state. For this reason, New Jersey courts have recognized that they have a duty to construe and enforce insurance contracts as written, without rewriting the contract or disregarding the express language used in the contract in order to provide coverage that was not provided by the contract itself.

In 1976, when Liberty Mutual issued its first policy to Monogram, it had "long been the law of this State that the court is bound to enforce the policy as it is written." Flynn v. Hartford Fire Ins. Co., 146 N.J. Super. 484, 488 (App. Div. 1977), certif. denied, 75 N.J. 5 (1977). Therefore, the New Jersey courts had been "insistent that clear basic terms and particular provisions of an insurance contract may not be disregarded at will and a new contract judicially made for the parties." Linden Motor Freight Co., Inc. v. Travelers Ins. Co., 40 N.J. 511, 525 (1963). To the contrary, "[a]bsent statutory prohibitions, an insurance company has the right to impose whatever conditions it desires prior to assuming its obligations and such provisions should be construed in accordance with the language used." Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960).

These jurisprudential principles continued to be echoed in a long line of New Jersey cases throughout the period of Liberty's coverage up to the decision in Spaulding. These decisions reflect the fundamental recognition that courts "cannot ... write for the insureds a better insurance policy than the one bargained for and purchased." Harleysville Ins. Cos. v. Garitta, 170 N.J. 223, 240 (2001).

In its Opinion, the Court recognized that the non-cumulation language was directly relevant to the allocation issue because "a non-cumulation clause generally, and Liberty's in particular, operates to limit an insurer's liability under multiple sequential CGL policies where losses related to a 'single occurrence' trigger the successive policies." Op. at 26. However, this Court made an explicit determination not to give effect to the policy language, stating that "Owens-Illinois eliminated reliance on particular contract language (other than limits and exclusions) and on traditional rules of interpretation, and set forth a uniform standard for resolving allocation issues in long-tail environmental exposure cases." Id. at 23.

It is respectfully submitted, however, that Owens-Illinois did not negate the critical importance of policy language in determining the obligations of insurers. To the contrary, in Owens-Illinois, this Court acknowledged unequivocally: "The source of any duty on the part of the Insurance Companies to defend actions or to pay any judgments is obviously in the contract of insurance." 138 N.J. at 446-47. Owens-Illinois rested squarely upon the finding that the policy language under consideration in that case – the "other insurance" provision – was simply inapplicable to allocation issues involving successive policies. Id. at 470. In particular, in the section of the Owens-Illinois decision entitled "Does the Language of the Policies Resolve the Allocation Issue?" the Court stated: "We are unable to find the answer to allocation in the language of the policies." Id. at 468. As a

result, the Court looked beyond the contract language in Owens-Illinois only after first finding that it did not shed light on the allocation issue.

Furthermore, it is respectfully submitted that the Owens-Illinois allocation methodology was not premised on a public policy of "maximizing" insurance coverage for environmental cleanup. Op. at 28. In fact, this Court recognized in Owens-Illinois that "[a] more consistent principle is required" because a rule of law premised on nothing more than the result-oriented goal of maximizing coverage is "judicial legislation." 138 N.J. at 452 (internal citation omitted). For this reason, this Court has refused in the past to engage in retroactive revision of an insurance contract, recognizing that it amounts to "an unbargained-for expansion of coverage, gratis, resulting in the insurance company's exposure to a risk substantially broader than that expressly insured against in the policy." Aviation Charters, Inc. v. Avemco Ins. Co., 170 N.J. 76, 80 (2001) (citation omitted).

Proceeding from these same principles, it is respectfully submitted that the non-cumulation provision in Liberty's policies should have been given effect. There is no more critical term in an insurance contract than the limit of liability. It defines how much coverage the insured bought and how much risk the insurer accepted. Alteration of this essential term changes everything. For this reason, the Court, after announcing its allocation methodology in Owens-Illinois, made it clear that it was not reducing the importance of limitations on the degree of risk accepted by the insurer, explicitly noting that "policy limits and exclusions must be taken into account." Owens-Illinois, 138 N.J. at 476. In fact, this caveat was so important that the Court said it twice, emphasizing that indemnity and defense costs should be allocated "in accordance with the mathematical model

developed, subject to policy limits and exclusions." Id. at 477.

On one level, the limit of liability is simply the dollar figure that appears on the Declarations page, but the significance of that dollar figure can be understood only by reference to the Limits of Liability section of the policy. In this case, Paragraph (C) of the Limits of Liability provision of the Liberty policies states that "property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be construed as arising out of one occurrence." No argument was made or could be made that the weekly disposal of Spaulding's lead-containing liquid slurry waste did not involve property damage arising out of continuous or repeated exposure to substantially the same general conditions. Paragraph (D) of the Limits of Liability provision applied when property damage arising out of continuous or repeated exposure to substantially the same general conditions took place over more than one year. It is equally clear that the 15-year history of disposal at the Caldwell Site caused property damage during more than one policy period. The non-cumulation clause, by its very terms, contemplates exactly this type of continuing injury, and required a determination that Liberty's maximum potential liability is $1,000,000.

This Court did not address Liberty's contract language, finding instead that Owens-Illinois had "rejected the idea that in an environmental exposure case, successive policies are triggered by a single occurrence." Op. at 27. However, Owens-Illinois did not hold that property damage arising out of continuous or repeated exposure to substantially the same general conditions should be considered as arising out of separate occurrences, despite contract language which clearly stated the opposite. In fact, Owens-Illinois contains no mention of the Limits of Liability provisions of the policies at issue in that case. As a result, there was no

consideration of contract language similar to the Liberty requirement that "[f]or the purpose of determining the limit of the company's liability, all personal injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be construed as arising out of one occurrence."[2]

Liberty acknowledges that Owens-Illinois states that "when progressive indivisible injury or damage results from exposure to injurious conditions for which civil liability may be imposed, courts may reasonably treat the progressive injury or damage as an occurrence within each of the years of a CGL policy." 138 N.J. at 478. However, this statement did not amount to a determination that there were separate occurrences. This is clear because the Court cautioned that "say[ing] that coverage is afforded under more than one policy seems different from saying that a policyholder may stack the limits of all the policies in effect during a period of repeated or continuous exposure. Id. at 469. If the Court had actually intended to hold that there were separate occurrences, this statement would have made no sense. The fact that the Court found that property damage continued through multiple policy years does not change the fact that it arose from only one "occurrence" – the repeated disposal of waste. More importantly, nothing in Owens-Illinois or New Jersey insurance law suggested that a court should declare a fully applicable contract provision, vital to the parties' bargain, null and void.

The Spaulding ruling appears to have been based on the belief that "[b]y applying the non-cumulation clause, insurers ... would be insulated from their fair share of liability in direct contravention of Owens-Illinois." Op. at 29. It is submitted, however, that retroactive revision of a

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[2] Similarly, there is no identification of the policy language at issue in Chemical Leaman Tank Lines v. Aetna Cas. & Sur. Co., 978 F. Supp. 589 (D.N.J. 1997).

contract two decades after it was made does not promote fairness. The contracts Liberty made, and the premiums it received, were based on the understanding, clearly stated in the typewritten endorsements to the contracts, that Liberty's limits would not be stacked. The contracts capped Liberty's potential liability for a continuing occurrence at $1,000,000. No argument has been made that that these policy terms had been unfairly imposed upon the insured. It was a fair allocation of the parties' relative liabilities because it was what the parties agreed to. In order to prevent a "double credit,"[3] this Court has now increased Liberty's potential liability from $1,000,000 to $8,500,000. Liberty is left to honor contracts it did not agree to write. Its duty to defend was unchanged by the decision; the types of claims for which it owed coverage remained the same; its premiums were not increased. The only page in the contract that was changed was the one that placed a limit on Liberty's obligations. The Spaulding decision nullified the parties' bargain – to the detriment of Liberty only – and substituted a

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[3] Outboard Marine Corp. v. Liberty Mut. Ins. Co., 283 Ill. App. 3d 630, 670 N.E.2d 740, 219 Ill. Dec. 62 (Ill. App.), appeal denied, 675 N.E.2d 634 (Ill. 1996) (hereinafter "OMC"), which was cited by the Court for the "double credit" analysis, involved a dispute between OMC and four of its excess insurers. Id. at 635, 670 N.E.2d at 743. The issues addressed included the application of the non-cumulation provisions in the excess policies. In this context, the OMC Court refused to give the non-cumulation provisions effect. Liberty is unable to determine the basis for the Illinois court's concern that the excess insurers might receive a double credit. However, it is clear that the combination of pro rata allocation and the non-cumulation clause never gives a primary carrier a double credit. For example, if Liberty's allocated share under Owens-Illinois was less than $1,000,000, Liberty would pay that allocated share in total and the non-cumulation provision would never come into play. On the other hand, if Liberty's allocated share was greater than $1,000,000, Liberty would pay $1,000,000 and pro rata allocation would confer no additional benefit because Liberty's liability had already been capped by the policy's occurrence limit.

new contract for the one made by Liberty and Monogram. Zacarias v. Allstate Ins. Co., 168 N.J. 590, 594 (2001).

B. THE COURT'S INVALIDATION OF THE CLEAR LANGUAGE OF LIBERTY'S NON-CUMULATION CLAUSE WAS INCONSISTENT WITH OWENS-ILLINOIS BECAUSE IT INHIBITS RISK TRANSFER BY MAKING INSURERS RELUCTANT TO ISSUE POLICIES COVERING NEW JERSEY RISKS.

The impact of the Spaulding decision will be to inhibit insurers from writing policies because they can no longer have confidence that their obligations will later be determined on the basis of "contract language and traditional rules of insurance policy interpretation." Op. at 21. The decision thus runs counter to the economic underpinning of Owens-Illinois – that the law should "not provide disincentives to parties to acquire insurance when available to cover the risks." 138 N.J. at 472-73. The corollary to this principle is that the law should not discourage insurance companies from issuing policies. It is respectfully submitted that Spaulding undermines the risk-spreading goals of Owens-Illinois because no insurer can set a price for a contract that might end up covering whatever risks a court subsequently concludes should have been covered notwithstanding contract language to the contrary.

As stated by the Court in Owens-Illinois: "The theory of insurance is that of transferring risks." 138 N.J. at 472. As a result, the Court emphasized the importance of "send[ing] the correct signals to the economic system" in order to increase, not decrease, the availability of insurance as an economic resource. Id. at 473 (citation omitted).

An essential element of risk transfer is risk acceptance by insurers, and a prerequisite for risk acceptance is the ability of insurance underwriters, through the language of their policies, to control the amount of risk they accept. When

insurers cannot predict the magnitude of the risks they may be undertaking under the policies they issue, they have two choices – increase premiums significantly to account for the possible imposition of unknown exposures or withdraw from the market altogether. Robert G. Berger, The Impact of Tort Law Development on Insurance: The Availability/Affordability Crisis and its Potential Solutions, 37 Am. U.L. Rev. 285, 300 (1988). Such decisions thus weaken the risk transfer mechanism because they create an incentive not to sell insurance, rather than an incentive to buy it.

In light of Spaulding, insurers will have to consider the possibility of judicial invalidation of policy limitations when pricing their policies. As a result, many insureds will have to pay a higher premium because premium pricing will have to include both a fair price for the coverage actually set forth in the contract plus an additional premium factor to cover the risk of judicial nullification of the policy's limitations. Secondly, insurers may be forced to eliminate coverage for continuous or repeated exposure to conditions or issue policies which exclude New Jersey operations. The pitfall to judicially created coverage is that "insurers will simply withdraw from the business of liability coverage, leaving the field with less competition and higher rates." American Home Products Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1511 (S.D.N.Y. 1983), aff'd, 748 F.2d 760 (2d Cir. 1984).

This is not mere speculation; it is experience. As explained in the correspondence sent by the Insurance Services Office to New Jersey regulators, after courts refused to give effect to the "sudden and accidental" pollution exclusion, the absolute pollution exclusion was created because "if companies do not have the option to delete the pollution coverage, they will simply not write any liability coverage at all." Edward Zampino, Richard C. Cavo, &

Victor C. Harwood, III, The Sophist's Maze: The Polluters' Revision Of The History Of The "Total" Pollution Exclusion, 8 Mealey's Litigation Reports: Insurance No. 44 (Sept. 27, 1994).

It must be recognized that the implications of the Spaulding decision go far beyond the dispute between the named parties in this case. It has never been the law of New Jersey that insurers "could not contract away [the] risks" that they do not want to accept. Op. at 19. To the contrary, in French v. New Jersey School Board Ass'n Ins. Group, 149 N.J. 478 (1997), the Court emphasized the significance of the clear language of applicable insurance policies in resolving coverage questions, id. at 493, and expressed confidence that "policy drafters have either anticipated or can anticipate most of the recurring problems." Id. at 494. In Magnifico v. Rutgers Cas. Ins. Co., 153 N.J. 406, 418 (1998), the Court expanded on this concept, stating that "insurers can modify policy language in an effort to address issues of ... coverage and liability."

Although these were underinsured motorist coverage cases, they were fully consistent with this Court's rulings for nearly a century. As early as 1922, in Kerpchak v. John Hancock Mut. Ins. Co., 97 N.J.L. 196, 198 (1922), the Court of Errors and Appeals recognized the importance of "the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of premium." Similarly, in Wickner v. American Reliance Ins. Co., 141 N.J. 392, 398 (1995), this Court gave effect to an unlisted premises exclusion because the Court properly recognized that "the unlisted property and the risks associated with it have not been included in the underwriting consideration or the determination of the cost of the policy."

The common denominator to all of these cases is the fundamental recognition that insurers have a right to control the amount of risk they accept and that insurance can only

operate if clear and unambiguous policy limitations are enforced as written. Expanding the liabilities of an insurer beyond the contractually defined limits of liability undermines the risk-for-premium exchange which is the essential element of the risk transfer mechanism. For this reason, Liberty respectfully requests that this Court reconsider its decision.

C. RETROACTIVE APPLICATION OF THE COURT'S DECISION WOULD VIOLATE THE DUE PROCESS CLAUSE.

As explained above, prior to the decision in this case, decades of precedent in New Jersey held that unambiguous language in insurance contracts must be enforced. This was the settled rule during the years in which the parties entered into the contracts at issue. This case is the first New Jersey case to depart from that rule. It is submitted that application of the new rule of law to the long-settled contractual obligations involved here would violate the "limitations on retroactive judicial decisionmaking" that are "inherent" in the Due Process Clause of the federal Constitution. Rogers v. Tennessee, 532 U.S. 451, 457, 466 (2001).

The United States Supreme Court has recognized that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disregarded." Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994). As a result, "due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity." Eastern Enterprises v. Apfel, 524 U.S. 498, 549 (1998) (Kennedy, J., concurring); see also Lynce v. Mathis, 519 U.S. 433, 440 (1997) ("In both the civil and criminal context, the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects.").

It is respectfully submitted that retroactive application of the rule adopted in this case would violate the Due Process Clause in three respects. First, the basic due process principles of notice and fair warning are violated by the retroactive application of a judicial decision that is "'unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue.'" Rogers, 532 U.S. at 462 (quoting Bouie v. City of Columbia, 378 U.S. 347, 354 (1964)). This does not mean that the decision itself must be indefensible – only that it must be a "marked and unpredictable departure from prior precedent" on the books when the conduct at issue occurred. Id. at 467. In Rogers, the Court concluded that a retroactive judicial decision did not violate due process only because the common-law rule eliminated by the decision was, at the time of the earlier conduct, already "widely viewed as an outdated relic" and had been abolished by the "vast majority of jurisdictions." Id. at 462. By contrast, the rule adopted in this case is explicitly derived from Owens-Illinois, itself a "watershed" case decided almost twenty years after the first of the Liberty contracts was made. Between 1976 and 1984 there was simply no precedent – no "law which had been expressed" – in New Jersey or any jurisdiction that would have given insurers and insureds any notice that limits of liability in an insurance contract would not be enforced just like any other unambiguous contractual language. As discussed above, the precedents were all uniformly to the contrary. Because the rule adopted in this case is a "marked and unpredictable departure" from those precedents, it would be violation of due process to apply the rule to the contracts at issue here.

Second, the "degree of retroactive effect" is also a "significant determinant" as to the constitutionality of retroactive civil liability under the Due Process Clause. Apfel, 524 U.S. at 549 (Kennedy, J., concurring). "If retroactive laws change the legal consequences of

transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership." Id. Accordingly, in Apfel, the Court invalidated a federal law imposing several millions of dollars of mineworkers' benefits liability on a coal company for events that took place 35 years earlier. The plurality reasoned: "The distance in the past that the Act reaches back to impose liability on Eastern and the magnitude of that liability raise substantial questions of fairness." Id. at 534. Although the plurality addressed the problem under the Takings Clause, see infra at 533, Justice Kennedy's concurrence – which reflected his decisive fifth vote – explained the same problem in terms of the Due Process Clause, finding a violation of the Clause because "in creating liability for events which occurred 35 years earlier the Coal Act has a retroactive effect of unprecedented scope." Id. at 549. Both Justice Kennedy and the four-Justice plurality recognized that while Congress might well have a legitimate interest in resolving "the problem of funding miners' benefits," "the Constitution does not permit a solution to [that] problem ... that imposes such a disproportionate and severely retroactive burden upon Eastern." Id. at 536 (plurality).

Similarly, the decision in this case would fundamentally rework contracts made between 19 and 27 years ago. In doing so it would impose millions of dollars in unexpected liability on one party to those transactions. New Jersey's interest in environmental cleanup cannot be effectuated by imposing severely retroactive burdens on Liberty that are disproportionate to the obligations Liberty agreed to undertake when it negotiated specific and unambiguous limits on its liabilities.

Third, retroactive application of new legal rules is of special concern in the context of impairing specific contractual obligations, for contractual rights are "matters in

which predictability and stability are of prime importance." Landgraf, 511 U.S. at 271. Thus, the Constitution includes a specific prohibition against laws that "impair[] the Obligation of Contracts." U.S. Const., art. I, § 10, cl. 1. The central function of the Clause is to bar states from retroactively "changing the relative situation of debtor and creditor." Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427-28 (1934); see also Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 503 (1987) (Contract Clause's "primary focus was upon legislation that was designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to satisfy"). Although the Clause by its terms applies only to legislative enactments, Tidal Oil Co. v. Flanagan, 263 U.S. 444, 451 (1924), the Clause's basic protection of existing contractual obligations necessarily applies to judicial decisions under the Due Process Clause; otherwise, the protection afforded by the Clause would be a virtual dead letter. Cf. Bouie, 378 U.S. at 353-54 ("If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.").

There is no doubt that if the New Jersey Assembly enacted a statute barring the enforcement of non-cumulation clauses in insurance contracts, application of that statute to existing insurance contracts would run afoul of the Contracts Clause. The question under the Contracts Clause is whether "the state law has, in fact, operated as a substantial impairment of a contractual relationship," as opposed to a mere "[m]inimal alteration." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244-45 (1978). An impairment is "substantial" if the contracting party "had no reason to anticipate" the impairment, and instead "relied heavily, and reasonably, on this legitimate contractual expectation in calculating" its obligations under the contract. Id. at 245-46.

It is particularly severe when the law "nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability" when those obligations are "in an area where the element of reliance [is] vital." Id. at 246-47. Moreover, even if the law serves a "significant and legitimate public purpose," the Court must still "satisfy itself that the legislature's adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying" the impairment. Keystone, 480 U.S. at 505.

It is respectfully submitted that retroactive application of the decision in this case would contravene the principles underlying the Contracts Clause. Indeed, invalidation of the crucial liability limitation reflected in the non-cumulation provisions strikes at the very heart of the Clause – barring states from "changing the relative situation of debtor and creditor," Blaisdell, 290 U.S. at 427-28. New Jersey courts have recognized that "the relationship between the insurance companies and the beneficiaries named in the policies is that of debtor and creditor." Marks v. Equitable Life Assur., 135 N.J. Eq. 339, 344 (Ch. 1944) (citations omitted). In addition, the impairment of the contract is obviously substantial: the decision in this case "nullifies express terms" of the contract, it imposes "completely unexpected liability," and it is a "severe," "permanent," "immediate," and "retroactive" change in the parties' contractual relationship.

The impact of retroactive invalidation is particularly significant in the context of Liberty's Limits of Liability provision because this provision is critical in determining not just the price of the contract, but more fundamentally, whether the insurer is willing to enter into the contract at all. Furthermore, the impairment of Liberty's contract was not necessary to meet the important societal goal of environmental cleanup. The imposition of obligations

beyond those agreed to by contract requires Liberty to bear a disproportionate burden to fund remediation which is neither a "reasonable condition" nor "a character appropriate to the public purpose" of providing for such remediation. Keystone, 480 U.S. at 505

For all these reasons, it is respectfully submitted that the Spaulding decision is "outside the bounds of retroactivity permissible under our law." Apfel, 524 U.S. at 550 (Kennedy, J., concurring). However, as this Court has long recognized, while its decisions are presumptively applied retroactively, they need not be when the holding of a case constitutes a "new rule of law," State v. Burstein, 85 N.J. 394, 403 (1981), and "it is in the interest of fairness and justice to apply the holding only prospectively," Green v. Selective Ins. Co. of Am., 144 N.J. 344, 355 (1996). Consistent with the due process limitations discussed above, the "primary focus of retroactivity is with considerations of fairness and justice, related to reasonable surprise and prejudice to those affected." Green v. Auerbach Chevrolet Corp., 127 N.J. 591, 600-01 (1992) (internal quotation marks omitted).

This case involves substantial problems of surprise and reliance. Nothing in New Jersey law between 1976 and 1984 provided either party a basis for predicting that the Limits of Liability language would be unenforceable. To the contrary, both parties should have expected that unambiguous contractual provisions would be enforced. The prejudice to Liberty is severe. In this case alone, Liberty's potential liability has been increased more than eight times – from $1,000,00 to $8,500,000 – and Liberty will potentially face hundreds of millions of dollars of additional exposure in other New Jersey cases involving Liberty contracts made long ago which contained anti-stacking provisions Accordingly, this Court should exercise its authority to "make the new rule of law [adopted in this case] purely

prospective, applying it only to cases whose operative facts arise after the decision is announced [*i.e.*, to cases involving insurance contracts negotiated after this decision]." Burstein, 85 N.J. at 304.

D. RETROACTIVE APPLICATION OF THE COURT'S DECISION WOULD VIOLATE THE TAKINGS AND EX POST FACTO CLAUSES.

It is respectively submitted that applying the new rule announced in this case retroactively would also violate the Takings Clause of the federal Constitution, U.S. Const. amend V, for essentially the same reasons retroactive application would violate due process. "The aim of the [Takings] Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Apfel, 524 U.S. at 522 (plurality opinion) (quotation omitted). That would be the impact of Spaulding, if applied retroactively. As the Apfel plurality explained, governmental action constitutes an impermissible taking "if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." Apfel, 524 U.S. at 528-29. That test is easily met here: as discussed above, the liability imposed is "severe," it is "retroactive," it is imposed on a "limited class of parties," it "could not have [been] anticipated," and it is "substantially disproportionate to the parties' experience" – which experience was to negotiate the very liability limitation the decision rejects.

Finally, the Constitution's Ex Post Facto Clause may also be implicated by the Spaulding decision. Although Liberty acknowledges that the ban on ex post facto legislation has come to be interpreted as reaching criminal law only, it is a legitimate question whether or not that was the interpretation

intended by the Framers. In his concurrence in Apfel, Justice Thomas stated that in an appropriate case, he would be willing to reconsider "whether a retroactive civil law that passes muster under our current Takings Clause jurisprudence is nonetheless unconstitutional under the Ex Post Facto Clause." Apfel, 524 U.S. at 539 (Thomas, J., concurring).

III. CONCLUSION

For the reasons stated above, Liberty respectfully requests that this Court reconsider its decision in this matter.

Respectfully submitted,

POST & SCHELL, P.C.

Dated: April 10, 2003

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APPENDIX H

POLICY LANGUAGE FROM THE LIBERTY MUTUAL POLICIES FOR THE PERIOD 1976 TO 1984

By means of endorsements to each of the Liberty policies, the Limits of Liability provisions in the preprinted policy jackets to the Liberty policies were deleted and replaced by typewritten language specifically addressing the amount of risk accepted by Liberty under its contracts. The relevant policy language in the endorsement provides:

> (A) The limit of liability stated in the schedule as applicable to "each occurrence" is the total limit of the company's liability for all damages because of bodily injury, personal injury and property damage as a result of any one occurrence.
>
> (C) For the purpose of determining the limit of the company's liability, all bodily injury, personal injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence.
>
> (D) If the same occurrence gives rise to bodily injury, personal injury or property damage which occurs partly before and partly within the policy period, the "each occurrence" limit and the applicable aggregate limit of this policy shall be reduced by the amount of each payment made by the company with respect to such occurrence under

> a previous policy or policies of which this policy is a replacement.

PRPa150 (emphasis in original).

The word "occurrence" is defined in the policy jacket as:

> "occurrence" means an accident including continuous or repeated exposure to conditions which results in **bodily injury** or **property damage** neither expected nor intended from the standpoint of the insured.

PRPa164 (emphasis in original).